No. 20416

United States Court of Appeals

FOR THE NINTH CIRCUIT

DRAGOR SHIPPING CORPORATION, a corporation, formerly Ward Industries Corporation,

Appellant,

vs.

UNION TANK CAR COMPANY, a corporation,

Appellee.

OPENING BRIEF OF APPELLANT, DRAGOR SHIPPING CORPORATION

Upon Appeal from the District Court of the United States for the District of Arizona

HULL, TERRY & FORD,
Phoenix Title Building,
Tucson, Arizona
and
LOTTERMAN & WEISER,
103 Park Ave.,
New York, N. Y.
Attorneys for Appellant, Dragor Shipping Corporation

NORMAN S. HULL
JOSEPH LOTTERMAN
PAUL ZOLA
Of Counsel

SUBJECT INDEX

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

LAW REVIEWS

STATUTES

No. 20416

United States Court of Appeals

For the Ninth Circuit

Dragor Shipping Corporation, a corporation, formerly Ward Industries Corporation,

Appellant,

vs.

Union Tank Car Company, a corporation,

Appellee.

OPENING BRIEF OF APPELLANT, DRAGOR SHIPPING CORPORATION

Upon Appeal from the District Court of the United States for the District of Arizona

---

The defendant-appellant, Dragor Shipping Corporation, formerly known as Ward Industries Corporation (and hereinafter designated as "Dragor"), appeals (1) from a final judgment for the sum of $1,037,500.00 made and entered against it on June 1, 1965 by the United States District Court for the District of Arizona, Tucson Division, in favor of plaintiff-respondent, Union Tank Car Company (hereinafter designated as "Union"); and (2) from an order of the said District Court made and entered on February 2, 1965 which denied the appellant's motion to quash, vacate and annul the service of process upon it in this cause (R. pp. 163-164*).

---

* Unless otherwise noted, all page references are to the pages of the Record on Appeal.

Jurisdictional Statement

Jurisdiction of the appeal exists under and by virtue of Sections 1291 and 2107, Judicial Code, Title 28, U.S.C. The jurisdiction of the District Court over the person of the appellant and the subject matter of the action was challenged and contested in the Court below.

Statement of the Case

The within action was purportedly commenced on December 24, 1964 by the plaintiff, a New Jersey corporation with its principal office in the State of Illinois, against the defendant, a Delaware corporation with its principal office in the State of New York. In its complaint, the plaintiff alleged that the defendant had breached an agreement of settlement and the non-negotiable promissory note issued by the defendant thereunder, both of which were executed and delivered by and between the plaintiff and the defendant in the State of New York on October 3, 1963. The liability of the defendant under the aforesaid settlement agreement and promissory note did not arise, and by its terms could not arise, until September 30, 1964.

Service of process upon the defendant was sought to be effected by service upon the Arizona Corporation Commission (R. pp. 12-14), ostensibly under the terms and provisions of Section 10-481 (a) (2) of the Arizona Corporation Statutes. That section authorizes the service of process upon the Arizona Corporation Commission, after a foreign corporation has voluntarily withdrawn from the State of Arizona, in an "action arising out of or involving business done or transactions arising in this State . . ." No process was ever served personally upon the defendant-appellant within the territorial confines of the State of Arizona.

The appellant Dragor, had formally withdrawn from the State of Arizona and terminated the authority of its statutory agent in Arizona to accept service on its behalf

on April 30, 1964, approximately five months before the plaintiff's cause of action allegedly arose and approximately eight months before the purported service of process upon the Arizona Corporation Commission in this case.

The appellant appeared specially to quash, vacate and annul the service of process upon it and to contest the jurisdiction of the Arizona District Court over its person and thereby the subject matter of the action. The appellant's motion to quash the service of process and dismiss the complaint was denied by the Arizona District Court on February 2, 1965, without opinion. Subsequently, the appellant was compelled to file its answer which set forth, among other things, a compulsory counterclaim. It alleged in its answer that it was not thereby waiving its special appearance or its constitutional objections to the jurisdiction of the District Court. The plaintiff-appellee thereupon moved to dismiss the compulsory counterclaim as insufficient in law and for a judgment on the pleadings upon the plaintiff's complaint. Although the District Court denied the appellee's motion to strike the compulsory counterclaim, it granted the motion for judgment on the pleadings, even before the pleadings were closed by the filing of the plaintiff's reply. A judgment in favor of the appellee Union against the appellant Dragor for the sum of $1,037,500.00 was made and entered by the District Court on June 1, 1965.

Within the time prescribed by law, the defendant-appellant filed its notice of appeal to this Court, accompanied by a bond for costs on appeal. Thereafter, it filed a supersedeas bond for the total amount of the judgment. The record on appeal was filed in this Court on September 24, 1965, and docketed on October 5, 1965, within the time prescribed by law.

The Issues Presented By This Appeal

As appears from the complaint, the plaintiff-appellee's cause of action is based upon the defendant-appellant's alleged breach of a settlement agreement and a non-nego-

tiable promissory note maturing on September 30, 1964 issued by the defendant-appellant thereunder, both of which were executed, issued and delivered by and between the plaintiff and the defendant in the State of New York on October 3, 1963. This appeal thus presents for this Court's review the validity of the District Court's assumption of jurisdiction over the subject matter of this action and the person of the appellant, a Delaware corporation which was neither qualified to do business, nor was actually engaged in doing business, in the State of Arizona for many months prior to September 30, 1964, when the plaintiff's cause of action allegedly arose. It likewise presents for this Court's review the validity of the District Court's action in refusing to quash the service of process upon the Arizona Corporation Commission in a suit against the appellant upon a cause of action which arose in the State of New York many months after the appellant had formally withdrawn from the State of Arizona.

The resolution of the issues thus presented by this appeal requires a determination of whether, under the recent decisions of the United States Supreme Court defining the constitutional limitations upon a state's assumption of jurisdiction *in personam* over non-residents, i.e., *International Shoe Co.* v. *State of Washington,* 362 U. S. 310; *McGee* v. *International Life Insurance Co.,* 335 U. S. 220; and *Hanson* v. *Denckla,* 357 U. S. 235, the Arizona District Court could lawfully, validly and constitutionally exercise an *in personam* jurisdiction over the defendant-appellant Dragor, a non-resident Delaware corporation, neither qualified to do business nor doing business in the State of Arizona, upon a cause of action accruing in the State of New York to enforce an obligation created solely by documents executed, delivered and allegedly breached in that state.

To apprehend the factual and legal scope of the issues posed by this appeal, we turn to a review of the proceedings before the Court below.

The Plaintiff's Complaint

The plaintiff's complaint contains two counts (R. pp. 2-11).

In its first count, the plaintiff alleges that it is a *New Jersey corporation* with its principal place of business in the *State of Illinois;* that the defendant is a *Delaware corporation* with its principal place of business in the *State of New York;* and that the matter in controversy exceeds the sum of $10,000.00 (R. p. 2).

It is further alleged that, on October 3, 1963, the defendant and the plaintiff executed a contract encaptioned "Agreement of Settlement" annexed to the complaint as Exhibit A (R. pp. 2, 5-9). That agreement provided, in part, that the appellant would pay to the respondent, "on or before September 30, 1964 the sum of One Million ($1,000,000) Dollars with interest at the rate of Five (5%) Per Cent per annum commencing from January 1, 1964, *which sum shall be evidenced by a non-negotiable promissory note*" of Dragor payable to the order of Union (R. p. 7). It is further alleged that the defendant failed to pay the sum of $1,000,000 "*when it became due as provided in said Agreement of Settlement*" and that such sum is due and owing from the defendant (R. p. 3).

In its second count, the plaintiff alleges that, on October 3, 1963, the defendant "*made, executed and delivered a promissory note*" (annexed to the complaint as Exhibit "B"), under the terms of which Dragor agreed to pay Union "*on September 30, 1964*" the sum of $1,000,000 with interest at the rate of 5% per annum after January 1, 1964 until maturity (R. p. 3). It is further alleged that payment of said promissory note is past-due and delinquent, and that the plaintiff is entitled to the recovery of said amount (R. p. 4).

Service of Process

Service of process was purportedly effected by the service of the summons and complaint upon the Arizona Cor-

poration Commission on the 24th day of December, 1964 (R. pp. 13-14), allegedly under the provisions of Section 10-481 (a) (2) of the Arizona Corporation Statutes. That section provides in part that a foreign corporation, before transacting any business in Arizona, shall:

> "Appoint in writing under the hand of its president or other chief officer, attested by its secretary, a statutory agent in each county in this state in which the corporation will carry on business, and file with the corporation commission, in the form prescribed by the commission, an irrevocable consent to service of pleadings or process which shall become effective upon the revocation, annulment or voluntary withdrawal of the license to do business in this state, and which shall provide that actions arising out of or involving business done or transactions arising in this state may be commenced against the corporation in any court of competent jurisdiction within this state, by the service of pleadings or process upon the commission. The commission, upon being served, shall forward by registered mail a duplicate copy of the pleading or process, or both, to the last address of the corporation on file with the commission against which the pleading or process is directed."

The Defendant's Motion to Quash and Annul the Purported Service of Process As Invalid, Unconstitutional and Void.

By notice of motion (R. pp. 15-16), supported by the sworn affidavit of Ralph R. Weiser, its president (R. pp. 17-28), the appellant Dragor appeared specially "for the sole and only purpose of contesting the propriety and validity of the purported service of process upon it in this cause, and the jurisdiction of this Court over its person and the subject matter of this action . . ." (R. p. 15). It moved for an order quashing, vacating and annulling the

purported service of process as "invalid, unconstitutional and void" and dismissing the summons and complaint upon the ground that the Arizona District Court did not constitutionally obtain thereby jurisdiction over the person of Dragor Shipping Corporation or the subject matter of this action (R. pp. 15-16).

The facts set forth in the sworn affidavit of the appellant's president, none of which were controverted or denied, and all of which must be accepted as true upon this appeal, are as follows:

Prior to October 3, 1963, Union and Dragor were engaged in several extensive litigations which were then pending in the States of Arizona and California (R. pp. 21-22). In addition, there were actions pending by third parties against Union and/or Dragor in various courts, including the State of New York (R. pp. 21-22). Finally, Dragor had asserted certain claims against Union for contract adjustment arising from and out of a subcontract which had theretofore been executed by and between Union and a joint venture of Dragor and Idaho Maryland Industries, Inc., a California company, covering a portion of the construction of missile bases near Tucson, Arizona (R. p. 22).

On October 3, 1963, all of these litigations, claims, cross-claims and demands were fully, finally and completely settled and compromised by a settlement agreement between Union and Dragor which was embodied in two documents, one encaptioned "Agreement of Settlement" (annexed to the complaint as Exhibit "A"), and the second encaptioned "Covenant Not To Sue" (annexed to Dragor's moving papers as Exhibit "2") (R. pp. 22, 5-9, 26-27). These two documents collectively constituted the compromise and settlement agreement between the parties (R. p. 22). Each of these documents was simultaneously executed and delivered in the State of New York. By its terms, the "Agreement of Settlement" required Dragor's execution and de-

livery to Union of a non-negotiable promissory note in the sum of $1,000,000 payable upon certain designated conditions on September 30, 1964 (R. p. 7). Such a note was simultaneously executed and delivered by Dragor to Union in the State of New York (R. pp. 10-11, 22).

Upon the issuance, execution and delivery of these three documents in the State of New York on October 3, 1963, every right, claim, obligation, demand, liability or cause of action which had previously existed or had previously been asserted by either of the parties against the other "regardless of the nature or description thereof and whether or not now known", were *forever released, discharged, extinguished and at an end* (R. pp. 6, 22). From and after October 3, 1963, the *only* duties which Dragor owed to Union and the *only* duties which Union owed to Dragor were those reciprocal duties and obligations which had been carefully and explicitly set forth in the "Agreement of Settlement", "Covenant Not To Sue" and "Promissory Note", *each of which was issued, executed and delivered in the State of New York* (R. p. 22). By their terms, these documents created a contingent obligation on the part of Dragor which was not to become due and owing, under any circumstances, *until September 30, 1964* (R. pp. 10-11).

In the Court below, Dragor emphasized the immutable doctrine that a Federal District Court is a court of limited jurisdiction and that its jurisdiction must affirmatively appear upon the face of the complaint (R. p. 19). In this action, the complaint alleges only that "on October 3, 1963", the date of the "Agreement of Settlement" and promissory note, Dragor was licensed to do business and was doing business in the State of Arizona (R. p. 2, Complaint, par. 1). It does *not* allege that the Agreement of Settlement or promissory note were negotiated, issued, executed, delivered or breached in the State of Arizona (R. p. 20). It does *not* allege that the plaintiff's cause of action arose or accrued in the State of Arizona. Further, although the complaint alleges that Dragor breached the Agreement of Settlement

and promissory note by allegedly failing to pay the stipulated sum on September 30, 1964, *there is no allegation in the complaint that, on September 30, 1964, the date when the alleged cause of action arose, Dragor was qualified to do business or was in fact transacting any business whatsoever in the State of Arizona* (R. p. 20).

On the contrary, as incontrovertibly appears from the moving affidavit, Dragor was not licensed to do business in the State of Arizona on September 30, 1964, and was not in fact transacting any business whatsoever in that state on that day, or for many months prior thereto, or at any time thereafter (R. p. 20). As appears from the formal certificate of the Arizona Corporation Commission (annexed to Dragor's motion papers in the Court below as Exhibit 1), Dragor had formally withdrawn from the State of Arizona on *April 30, 1964,* approximately five months before the plaintiff's cause of action accrued (R. pp. 20, 25). Simultaneously, the authority of its statutory agent to accept service on its behalf was duly terminated (R. p. 20). The appellant's president swore, and it was nowhere controverted, that the appellant had not engaged in the transaction of any business of any kind in the State of Arizona for many months prior to its formal withdrawal from that state on April 30, 1964, or at any time thereafter (R. p. 20).

Consequently, it is incontrovertible that Dragor was not engaged in the transaction of any business or qualified to transact any business in the State of Arizona, either on September 30, 1964, when Union's alleged cause of action arose upon an instrument executed, delivered and effective in the State of New York, in a transaction consummated in the State of New York, or on December 24, 1964, when service of process was effected upon the Arizona Corporation Commission (R. p. 20).

The causes of action set forth in the plaintiff's complaint are, upon their face, based upon the plaintiff's affirmance of the New York settlement agreement of October 3, 1963

and the New York promissory note executed and delivered by Dragor thereunder (R. p. 23). By this action, Union is seeking to enforce in Arizona a duty created solely and only by documents executed, delivered and effective in the State of New York, and not a duty created by any other fact, transaction or circumstance occurring at any other time or place (R. p. 23). Similarly, Dragor is claiming the benefits of that settlement agreement, benefits of which it has allegedly been deprived by Union's breach of the specific obligations which it had undertaken under these very settlement documents (R. p. 23).

In summary, it conclusively appears from the sworn affidavit submitted in support of Dragor's motion to quash the service of process that:

(1) Neither Union nor Dragor is an Arizona corporation. Neither has ever had its principal place of business in the State of Arizona.

(2) On October 3, 1963, all rights, claims, obligations, liabilities or causes of action which had theretofore existed between Union and Dragor, "regardless of the nature or description thereof, and whether or not now known", were forever released, extinguished and at an end.

(3) On and after October 3, 1963, the *only* duties which Union owed to Dragor, and the *only* duties which Dragor owed to Union, were the duties created by the settlement documents and promissory note issued, executed and delivered in the State of New York.

(4) On April 30, 1964, Dragor formally withdrew from the State of Arizona and terminated the authority of its statutory agent in Arizona to accept service on its behalf. It has not engaged in the transaction of any business of any kind in the State of Arizona since that date.

(5) On September 30, 1964, the date when Dragor's promissory note allegedly became due and Union's cause of action allegedly accrued, Dragor was neither qualified to do business in the State of Arizona nor was it engaged in the transaction of any business in that state.

(6) The causes of action set forth in Union's complaint, based upon and arising out of Dragor's alleged breach of documents and instruments executed and delivered in the State of New York, are not causes of action which come within the purview of Section 10-481 (a) (2) of the Arizona Corporation Statutes or any other Arizona state statute which purports to authorize the Arizona Courts to exercise an *in personam* jurisdiction over non-residents upon causes of action arising in Arizona.

Union's Opposition to Dragor's Motion

The only statement under oath submitted by Union in opposition to Dragor's motion to quash was an affidavit of Thomas C. McConnell, one of Union's counsel (R. pp. 62-63). In that affidavit, Mr. McConnell did not deny the statements of fact contained in the moving affidavit of Dragor's president. He merely argued that the formal certificate issued by the Arizona Corporation Commission certifying to Dragor's withdrawal from the State of Arizona on April 30, 1964 contained the provision "and thereupon said corporation ceased to exist, except as to creditors" (R. p. 63).

Mr. McConnell contended that, "at the time of said attempted withdrawal by Ward (Dragor), the plaintiff Union was a creditor of Ward (Dragor) on an obligation created by acts performed in Arizona at a time when Ward (Dragor) was qualified to do business in Arizona and therefore by the very terms of the affidavit Ward (Dragor) did not terminate its authority to do business in Arizona as against this plaintiff".

In short, Union claimed in the Court below that, on April 30, 1964, the date when Dragor formally withdrew from Arizona and terminated the authority of its statutory agent, Union was an *Arizona creditor* of Dragor "on an obligation *created by acts performed in Arizona*", although on that day, Dragor's *only* obligation to Union was its contingent liability upon a *New York* promissory note issued and payable under a *New York* settlement agreement executed and delivered six months before. This specious legal argument, founded upon the factually insupportable assertion that Union was an Arizona creditor of Dragor upon an Arizona obligation when it withdrew from Arizona on April 30, 1964, was sustained by the District Court in overruling Dragor's motion to quash and annul the service of process herein.

The Decisions of the Arizona District Court

Dragor's motion to annul and vacate the service of process was denied by the District Court on February 2, 1965 without opinion (R. p. 182). Subsequently, the District Court refused, likewise without opinion, to certify a question to this Court for immediate hearing under 28 U.S.C., Section 1292, Subsection (b) (R. pp. 64-67, 182). An attempt to procure a review by this Court of the constitutional issues presented herein by an application for leave to file a petition for a writ of prohibition was denied on March 22, 1965 (R. p. 169).

Thereafter, Dragor invoked every remedy available to it to avoid the interposition of its answer and compulsory counterclaim because of its fear that it might thereby involuntarily waive its special appearance (R. pp. 104-105; 89-90). Union's argument that Dragor would not waive its special appearance by the service of such a pleading was upheld by the District Court. Subsequently, having exhausted all its remedies, Dragor filed an answer containing a compulsory counterclaim. Union thereupon moved (1)

to dismiss the compulsory counterclaim as insufficient in law (R. p. 117) and (2) for a judgment on the pleadings (R. p. 110). Although the District Court denied Union's motion to strike the compulsory counterclaim, it granted Union's motion for judgment on the pleadings on plaintiff's complaint (R. 184), even before the pleadings were closed by the filing of Union's reply to the counterclaim (R. pp. 141-142, 154-156, 184). The judgment was made and entered on June 1, 1965 (R. p. 151). It is from that judgment, and the order denying appellant's motion to quash the service of process, that this appeal has been taken (R. pp. 163-164).

Specification of Errors

I

The District Court erred in denying the appellant's motion to quash, vacate and annual the service of process upon the Arizona Corporation Commission and dismiss the plaintiff's complaint upon the ground that the Court did not possess an *in personam* jurisdiction over the appellant, a non-resident Delaware corporation, neither qualified to do business nor doing business in the State of Arizona, upon a cause of action arising in the State of New York to enforce an obligation created solely by documents executed, delivered and allegedly breached in that state.

II

The District Court erred in attempting to assume jurisdiction over the appellant, a non-resident Delaware corporation, after it had formally withdrawn from the State of Arizona, upon a cause of action arising in the State of New York after such withdrawal.

III

The District Court erred in holding that, on April 30, 1964, when the appellant formerly withdrew from the State of Arizona and terminated the authority of its

statutory agent in that state, the appellee was an Arizona creditor of the appellant upon an obligation created in Arizona. The obligation sought to be enforced in this action by the plaintiff was solely an obligation created by a settlement agreement and promissory note executed and delivered by and between the parties in the State of New York, which became due on September 30, 1964, when the appellant was neither qualified to do business nor doing business in the State of Arizona.

ARGUMENT

POINT I

The Arizona District Court's Assumption of Jurisdiction Over the Person of Dragor and Thereby Over the Subject Matter of This Action Is Unconstitutional and Void Under the Decisions of the United States Supreme Court Culminating in *Hanson* v. *Denckla*, 357 U. S. 235.

It appears, without contradiction, that the appellant Dragor has not been authorized or qualified to do business in the State of Arizona since April 30, 1964. It has not engaged, since that date, and for many months prior thereto, or at any time thereafter, in the transaction of any business whatsoever in the State of Arizona. It was neither qualified to do business, nor engaged in the transaction of any business in that state, on September 30, 1964, the date when Union's cause of action against Ward allegedly arose.

It further appears, equally without contradiction, that the respondent Union's cause of action is based upon Dragor's alleged breach of a settlement agreement embodied in three documents encaptioned "Agreement of Settlement", "Covenant Not to Sue" and "Promissory Note", all of which were executed, issued and delivered by and between the parties in the State of New York on October 3, 1963. By its very terms, the settlement agreement fully, completely,

finally and irrevocably discharged each and every pre-existing right, claim, obligation, demand, liability or cause of action, "regardless of the nature or description thereof and whether or not now known". From and after October 3, 1963, the date when this transaction was duly consummated in the State of New York, the only duties owed by these parties to each other were their reciprocal duties and obligations created by the execution of the Agreement of Settlement, Covenant Not to Sue and Promissory Note in the State of New York, and not in the State of Arizona.

A.

The New York settlement between Union and Dragor on October 3, 1963 extinguished forever any and every demand, claim and liability, wherever the same had arisen, which had theretofore been asserted between the parties. The only duties and obligations thereafter arising and the only duties and obligations enforceable in this action were the duties and obligations created by the New York settlement and New York promissory note under New York law.

A settlement and compromise constitutes, at common law, "*a new and superior contract superseding and extinguishing the contract or contracts upon which the original action between the parties was based, and the action itself.* It relates to matters of differences and controversies, other than, as well as, those involved in the original action. It concerns all the claims and grievances of the plaintiff against the defendant and of the defendant against the plaintiff. Each party enters into new agreements and assumes new obligations". (*Moers* v. *Moers*, 229 N. Y. 294, at 300).

A comprehensive description of the legal import of the settlement agreement under the laws of the State of New York—the locus of the instruments—was formulated by the New York Court of Appeals in *Yonkers Fur Dressing Co.* v. *Royal Insurance Co.*, 247 N. Y. 435, in the following language at pages 444, 446:

"The settlement of the original controversies involved in these actions resulted in a new agreement to the effect 'that the above entitled litigation is settled and terminated, * * * the insurance companies in interest having agreed to pay the sum of $92,500 in full settlement of all claims.' This is not a mere arrangement between counsel made during the pendency of the case from which a party might be relieved when both parties could be restored substantially to their former position in court and when it would be inequitable to hold the parties to it. (Magnolia Metal Co. v. Pound, 60 App. Div. 318; Hallow v. Hallow, 200 App. Div. 642.) It is the settlement and termination of the litigations, marking a fresh start by the plaintiff from a new coign of vantage. The compromise was wholly foreign and extrinsic to the litigation and to any action by the court. * * * *When the cases were marked 'settled and discontinued' in open court by the parties, it was as if they had never been begun.*

A contract of settlement, if valid in itself, is final and is to be sustained by the court without regard to the validity of the original claim. (Smith v. Glens Falls Ins. Co., 62 N. Y. 85; Sears v. Grand Lodge A.O.U.W., 163 N. Y. 374.)

* * * The agreement of settlement was, under these circumstances, entered into by defendants, not lightly, inadvertently, inadvisedly or improvidently, but in order to make the best terms possible with the plaintiff. The hope of gaining was balanced against the risk of losing. There was an exchange of equivalents, irrevocable except for fraud, a settlement of a controversy presumably honest. *The old causes of action were terminated. A new liability was substituted therefor. The nature of the new cause of action we need not define. Enough to say that it superseded the old.*" (Italics ours)

The foregoing rules of law have been universally applied. In *Wilson* v. *Bogert*, 81 Idaho 535, 347 P. (2d) 341, 345, the Supreme Court of Idaho formulated the applicable principles as follows, citing California decisions in support thereof:

> "An agreement of compromise and settlement is a merger and bar of all pre-existing claims which the parties intended to settle thereby. Moran v. Copeman, supra; Shriver v. Kuchel, 113 Cal. App. 2d 421, 248 P. 2d 35; 15 C.J.S. Compromise and Settlement § 24, p. 739. *Such prior claims are thereby superseded and extinguished.* The compromise agreement becomes *the sole source and measure of the rights of the parties* involved in the previously existing controversy. The existence of a valid agreement of compromise and settlement is a complete defense to an action based upon the original claim. Bruce v. Oberbillig, 46 Idaho 387, 268 P. 35; Shriver v. Kuchel, supra; Argonaut Ins. Exch. v. Industrial Acc. Commission, 49 Cal. 2d 706, 321 P. 2d 460; 11 Am. Jur., Compromise and Settlement, § 36 p. 284." (Italics ours)

In *Jones* v. *Noble*, 3 Cal. App. 2d 316, 39 P. (2d) 486, 489, the District Court of Appeals of California ruled as follows:

> "It is well understood that the making of a valid compromise agreement to settle claims for money which are stated in a cause of action in a pending suit in court *extinguishes the cause of action;* the compromise agreement becoming successor to or substitute therefor. Armstrong v. Sacramento Valley R. Co., 179 Cal. 648, 178 P. 516." (Italics ours)

The Arizona rule is precisely the same. In *Pacheco* v. *Delgardo*, 46 Ariz. 401; 52 P. (2d) 479, 480, the Arizona Court declared:

> "It is unquestioned that where a plaintiff has a cause of action against a defendant, and the same is

> compromised and satisfied in a proper and legal manner, the right of action is entirely *extinguished,* and no suit may be brought thereon''. (Italics ours)

Again, in *Cano* v. *Arizona Frozen Products Co.,* 38 Ariz. 404, 408, 300 Pac. 953, the Court held:

> ''If A, who claims B owes him $2000, offers to accept a note of $1000 in full settlement of the claim and B delivers the note, if it is not paid when due, the suit must be on the note, and not on the original claim.''

If, as the Courts throughout the land, including New York and Arizona, have universally held, an agreement of settlement completely extinguishes an existing claim and disposes of a previously instituted action or actions ''as if they had never been begun'' (*Yonkers Fur Dressing Co.* v. *Royal Insurance Co., supra,* at p. 444), and if, by virtue of the agreement of compromise and settlement, ''a new liability was substituted'' for any claims previously existing, the new having ''superseded the old'', then it is plain that the situs of the actions thereby superseded, extinguished and at an end ''as if they *had never been begun*'', cannot possibly constitute a constitutional basis for the assumption of jurisdiction over a non-resident upon the superseding obligation by any state other than the state where that new obligation was created.

In the Court below, the respondent argued, in its memorandum of points and authorities that: ''The fact that the settlement agreement and promissory note were physically signed in New York is not material in determining whether the claim sued upon arises out of defendant's conduct in this state. At most, the settlement agreement and note evidence defendant's obligation; the documents themselves do not constitute payment of the obligation which arose by reason of Dragor's default in performance of the contract in Arizona'' (R. pp. 54-55).

The argument is spurious. It is predicated upon a total misstatement of the import of the promissory note and agreement of settlement which constitute the sole and only basis for the plaintiff's cause of action. Implicit in Union's argument that the plaintiffs cause of action upon the New York settlement agreement and New York note, the only cause of action alleged in the complaint, "arose" by reason of "Dragor's default in performance of the contract in Arizona" is the totally erroneous hypothesis that the New York settlement agreement constitutes somehow, in some way, an admission by Dragor of a "default" in Arizona. It hardly requires any extensive or exhaustive enumeration of authorities to establish the proposition that the settlement of an action is never deemed evidence of a liability, nor does it constitute an admission of such liability. It is simple hornbook law that "settlements are considered *as merely showing a desire to avoid or to seek a surcease of litigation on the part of the defendant*—a policy favored by the law". (*Quillen* v. *Board of Education*, 203 Misc. 323 (N.Y.), citing 4 Wigmore on Evidence [3d ed.], §§ 1061-1062.) "It has always been the policy of the law to favor compromise and settlement." (*Dansby* v. *Buck*, 92 Ariz. 1, 8; 373 P. (2nd) 1.)

B.

Having formally withdrawn from the State of Arizona on April 30, 1964, and terminated the authority of its Arizona statutory agent on that day, Dragor could not, eight months thereafter, be subjected to the jurisdiction of the Arizona District Court upon a cause of action arising in the State of New York under settlement documents executed and delivered in that state.

The cause of action presented by the instant complaint, over which the District Court purported to assume jurisdiction *in personam* over this defendant, is *a cause of action arising in the State of New York on September 30, 1964 upon settlement documents executed and delivered in the State of New York*, having no constitutional relationship whatsoever to the claims extinguished by those settlement

documents on October 3, 1963. Any matter, fact or circumstance occurring *prior* to the execution of the settlement documents in the State of New York, which alone constitute the source of the parties' mutual liabilities and the Court's judicial power to determine the same, is totally irrelevent, under the decisions of the United States Supreme Court, in determining the constitutional power of a state to subject non-residents to its process.

No federal Circuit Court in the United States has engaged in a more exhaustive and penetrating critique of the constitutional basis for the exercise or disavowal of *in personam* jurisdiction over non-residents than this Court. Its recent decisions in this area constitute a comprehensive analysis of the latest United States Supreme Court decisions upon the subject and a clear formulation of the operative factors which must exist before the jurisdiction of a state or federal court may properly and constitutionally be invoked over the persons of those who reside beyond its territorial borders.

In *L. D. Reeder Contractors of Arizona* v. *Higgins Industries,* 265 Fed. (2d) 768, this Court was called upon to examine the three most recent United States Supreme Court decisions in the field of jurisdiction *in personam*—*International Shoe Co.* v. *State of Washington,* 326 U. S. 310; *McGee* v. *International Life Ins. Co.,* 355 U. S. 220; and *Hanson* v. *Denckla,* 357 U. S. 235—and formulate therefrom the constitutional principles applicable to the efforts of a state to subject non-residents beyond its borders to the mandate of its courts.

This Court commenced its opinion with a concise statement of fundamental law. It declared at p. 770:

> "'Jurisdiction' in law is not a simple matter. To obtain a valid judgment, the party seeking it must (a) proceed in a competent court; (b) give his opponent reasonable notice of the litigation and grant

him a reasonable opportunity to be heard; and (c) establish 'judicial jurisdiction' over the defendant involved.

Obviously a lack of competence of the court to hear the matter will prevent the entry of a valid judgment. In statutory courts, of which the federal court is one, compliance with the statutory jurisdictional requirements, such as diversity and amount in controversy, must be alleged and proven. McNutt v. General Motors Acceptance Corp., 1936, 298 U. S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135; Chicago Burlington & Quincy R. Co. v. Willard, 1911, 220 U. S. 413, 419-421, 31 S. Ct. 460, 55 L. Ed. 521."

It thereupon reviewed with great care the three United States Supreme Court decisions noted above and drew the following conclusions therefrom (p. 773):

"We note that the acts which have a substantial connection with the state are acts which also have a substantial and, indeed, *direct connection with the cause of action sued upon;* i.e., *the cause of action arises by reason of acts so connected.* When this double substantial connection exists, then, in view of the broad language of McGee v. International Life Ins. Co., supra, a single act or transaction may be the basis for jurisdiction over a nonresident defendant.

This broad language of McGee v. International Life Ins. Co., supra, must likewise be considered in view of the Supreme Court's latest pronouncement on the subject in Hanson v. Denckla, 1958, 357 U. S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283. There the Florida probate court attempted to exercise personal jurisdiction over a Delaware trustee by means of constructive service by publication authorized by Florida statute. The trust had been created in

Delaware of a corpus physically located therein by a resident of that state who had later become domiciled in Florida. There had been correspondence by mail between settlor and trustee, and income paid to the settlor in Florida. The settlor also exercised a power of appointment over the trust while living in Florida.

In Hanson v. Denckla, supra, Mr. Chief Justice Warren's opinion *denied jurisdiction on these facts,* finding that the 'minimal contacts' required for jurisdiction did not exist, for:

> 'The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' 357 U. S. 235, 253, 78 S. Ct. 1228, 1239.

Thus there is established as essential some act by which the defendant 'purposefully' seeks the privilege of conducting activities within the forum state and obtaining the benefit and protection of its laws. *This essential act of the defendant must give rise to or result in a cause of action within that forum state.''*

It adopted, with approval, the following exposition of existing law (p. 773, footnote 10):

> ''Everyone concedes, of course, that jurisdiction, grounded upon a single act, *must be limited to causes of action arising out of that act.* To subject the nonresident individual, or corporation, to a general in personam jurisdiction because of such limited contact would be unfair and unreasonable, no matter how

adequate the notice. Sobeloff, Jurisdiction of State Courts Over Non-Residents in Our Federal System, 43 Cornell L. Q. 196, 208 (1957)."

In concluding that Higgins could not be subjected to the jurisdiction of the California courts, this Court emphasized the following considerations, each of which is directly applicable to the case at bar (pp. 775 et seq.):

"It is difficult to see how any facts showing defendant's activities within the forum state of California gave rise to any of the causes of action contained in the complaint. The shipment went to Reeder in Arizona. Any specific activity in California by Higgins' agents, subsequent to the contract, related only to time of shipment.

* * * We think a consideration of these factors leads us to the inescapable conclusion that as to appellee Higgins the 'estimate of inconveniences' weighs heavily in its favor. We need not point out again the slim thread of facts which connects Higgins with the forum state which the appellant has chosen. We do feel that it is significant that this is not a case where the state of California 'has a manifest interest in providing effective means of redress for its residents', to use the words of Mr. Justice Black in the McGee case. Reeder, the plaintiff here, is not a California corporation but an Arizona corporation, doing business in Arizona by use of the very goods which are the subject of this suit. We note, also, that a very recent federal court case in New York has taken this view under a statute similar to that in question in the McGee case. We think it a sound and reasonable view under the facts of this and similar cases.

* * * We recognize the courts generally have come a long way from Pennoyer v. Neff, supra, but if they

> are to come as far as appellant would urge us here, that final step would be a first one, and must come from a higher court." (Italics ours)

This Court's decision in the foregoing case was followed by its decision in *Kourkene* v. *American BBR, Inc.*, 313 Fed. (2d) 769, wherein it completely reaffirmed the principles which it had previously formulated. In quashing service upon a Pennsylvania corporation, purportedly effected by serving the Secretary of State of California, this Court ruled as follows (p. 773):

> "Weighing the facts of this case against these tests, we hold that the district court did not err in granting appellee's motion to quash the service made upon it through the Secretary of State. As noted earlier, appellee's principal place of business is in Philadelphia, Pennsylvania. There is no evidence that appellee has ever qualified to do business in this state; has ever maintained any office, records, agents, employees, distributors or representatives in California; has ever manufactured or produced any product or commodity for sale within California; or ever shipped or sold any such product or commodity within California. At the most, the evidence reveals a few isolated activities on the part of appellee in California. *Since it is clear that the appellant's cause of action did not arise out of or result from any of these activities,* we agree with the district court that 'the record is devoid of any evidence which would warrant the conclusion that American BBR is doing business in California.'" (Italics ours)

Under the United States Supreme Court decisions in *International Shoe Co.* v. *State of Washington, supra, McGee* v. *International Life Ins. Co., supra,* and particularly, *Hanson* v. *Denckla, supra,* as well as this Court's decisions

in the *L. D. Reeder* and *Kourkene* cases, *supra*, it is clear beyond the possibility of controversy or dispute that the act or transaction committed within the forum state which is claimed to constitute the constitutional nexus for jurisdiction over the non-resident *must be the very act or transaction creating the cause of action within the forum state which is sought to be asserted against such non-resident.* In the language of this Court in the *L. D. Reeder* case, *supra*, such act "*must give rise to or result in a cause of action within that forum state*" (p. 773).

The validity of these principles was strikingly confirmed by the District Court in its recent decision in *Executive Properties, Inc.* v. *Sherman*, 223 Fed. Supp. 1011 (Nov., 1963). In that case, the plaintiff, an Arizona corporation, was employed by the non-resident defendants, pursuant to a written contract delivered in Arizona, to procure a purchaser for real property located in Arizona. The plaintiff alleged that it procured such a purchaser but that the defendants refused to perform. Since the defendants were residents of Illinois, service was effected by registered mail under Rule (4) (e) (2) of the Arizona Rules of Civil Procedure. The defendants thereupon moved to dismiss the cause for lack of jurisdiction over the person of the defendants.

In affirming jurisdiction, District Judge East underscored the fact that the plaintiff's cause of action *arose in the State of Arizona* as a result of the acts committed by the defendants *within that state.* He particularly emphasized the United States Supreme Court's decision in *Hanson* v. *Denckla*, 357 U. S. 235 with its stress upon the *fact that the cause of action arose* "*out of an act done or transaction consummated in the forum State.*" Judge East ruled as follows (pp. 1015 *et seq.*):

> "Hanson acknowledged the International Shoe doctrine of 'minimum contacts' but failed 'to find

such contacts in the circumstances of this case * * *' as 'the record discloses no solicitation of business in that State either in person or by mail.' And, further '* * * [*t*]*he cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State.*' [Italics supplied.] 357 U. S. 251, 78 S. Ct. 1238, 2 L. Ed. 2d 1283.

This language from Hanson lends great significance to the language of Rule 4, which subjects a person who '* * * has caused an event to occur in this state out of which * * * the [cause of action] arose * * *' to *in personam* jurisdiction.''

* * *

''As for the case before us, the following in-Arizona contacts appear on the record:

1) Plaintiff, one of the contracting parties, is and was at all pertinent times an Arizona corporation;

2) The nonresident defendants own real estate situate in Arizona, the subject matter of the contracts, and over which the claimed brokerage commission claim held by plaintiff arose;

3) The entire unilateral performance by plaintiff of the contract out of which the claim (cause of action of plaintiff) for a brokerage commission is based was wholly had within Arizona; and

4) The defendants caused their executed documents to be sent into Arizona to be acted upon in Arizona, and one of the defendant trustees was actually present within Arizona at the time of executing escrow instructions with reference to the exchange agreement.

It is from these events which the defendants 'caused * * * to occur in (Arizona), out of which

> (plaintiff's) claim * * * which is the subject of the complaint arose, * * *' Manifestly, the defendants had more than the requisite 'minimum contacts' with Arizona under the formula of International Shoe, supra, in order to affix in personam jurisdiction, and, furthermore:
>
> 'It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State.' McGee, supra, 335 U. S. p. 223, 78 S. Ct. p. 201, 2 L. Ed. 2d 223." (Italics ours)

Distinguished commentators upon the meaning, purport and scope of the United States Supreme Court's decisions in the *International Shoe Co., McGee* and *Hanson* cases, *supra*, have all supported the views herein expressed. Thus, Judge Sobeloff, whose article in 43 Cornell Law Quarterly 196, entitled "Jurisdiction of State Courts Over Non-Residents in Our Federal System" was cited with approval by this Court in *L. D. Reeder, supra*, at page 773, referred to the decision of his own Circuit Court in *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F. (2d) 502 (4th Circ., 1956). In that case, Erlanger, a North Carolina corporation, sent its representative to New York to purchase a quantity of synthetic yarn. The defendant Cohoes, a New York corporation, sold and shipped the goods to Erlanger in North Carolina, f.o.b., New York. Erlanger later brought suit in the North Carolina State Court to recover for alleged defects in the goods. Jurisdiction was sought under a North Carolina Statute which provided that foreign corporations, though not doing business in North Carolina, were subject to suits or claims arising from a sale of goods, *no matter where consummated*, if the goods were shipped into North Carolina and were used in that state. Upon removal of the case to the District Court, service was quashed and the decision of the District Court affirmed on appeal. In commenting upon this decision under the doctrines formulated by the United States Supreme Court, Judge Sobeloff declared in his article (*supra*, at p. 208):

> "Everyone concedes, of course, that jurisdiction, grounded upon a single act, must be limited to causes of action arising out of that act. To subject the non-resident individual, or corporation, to a general in personam jurisdiction because of such limited contact would be unfair and unreasonable, no matter how adequate the notice."

A study published in the Georgetown Law Journal, Vol. 47, p. 326, encaptioned "Jurisdiction Over Non-Resident Corporations Based On A Single Act: A New Sole for International Shoe" cited by this Court with approval in the *L. D. Reeder* decision, *supra,* pp. 773-774, footnote 12, formulated as Rule 2 of the "three rules which can be drawn from a combined reading of *International Shoe, McGee* and *Hanson,* against which all future litigation of a like nature may be tested" the fundamental principle that *"the cause of action must be one which arises out of or results from the activities of the defendant within the forum."*

That the State of Arizona, prior to the execution and delivery of the settlement agreement on October 3, 1963, may constitute the locus of some part of the historical background preceding the creation in New York under New York law of the rights and responsibilities of the parties to the settlement agreement, cannot possibly constitute any support whatsoever for the District Court's assumption of jurisdiction in this matter. The precise issue was presented to the New York Courts in the recent case of *Boas and Associates* v. *Vernier,* 22 App. Div. (2d) 561, decided by the Appellate Division of the First Department on March 23, 1965. The plaintiff sued to recover commissions as a business broker and industrial consultant in introducing the defendant to certain French underwriters. Initially, the plaintiff was employed under a written agreement "negotiated and executed in New York by defendant as General Manager of the French corporation". Subsequently, the written agreement of employment was *superseded* by an

oral agreement for the plaintiff's services under which the plaintiff claimed a commission. The oral agreement was not negotiated or concluded by the parties in New York.

Jurisdiction was sought to be sustained upon the ground that the prior written agreement had been executed in New York and that such contract was sufficient to sustain the jurisdiction of the Court over the defendant. In dismissing the action upon the ground that the Court lacked jurisdiction over the person of the defendant, the New York Court ruled as follows, in language directly applicable to the instant case:

> "The complaint seeks the agreed commissions earned by plaintiff as broker and consultant in introducing defendant to certain French underwriters and rendering other services leading to the merger of a French corporation of which defendant was principal stockholder and chief executive officer into a new French corporation. In the absence of any showing that the oral agreement with defendant was negotiated or concluded by defendant in New York, it cannot be said that the causes of action arose from an act of defendant in the transaction of business within the State (CPLR 302, subd. [a], par. 1). *The fact that a prior written agreement was historically necessary to the inception of the subsequent oral agreement does not alone, for purposes of the jurisdiction statute, support personal jurisdiction.*" (Italics ours)

Of decisive importance in the determination of the issues presented by the instant case is the ruling of the New York Court in the cited decision that "the fact that a prior written agreement was *historically necessary to the inception of the subsequent oral agreement* does not alone, for purposes of the jurisdiction statute, support personal jurisdiction". Similarly, in this case, the fact that certain reciprocal claims had arisen prior to the execution of the settlement agree-

ment, or that certain litigations were pending prior to the consummation of that settlement agreement and were "historically necessary to the inception" thereof, does not and cannot constitutionally support the assertion of jurisdiction by the State of Arizona on behalf of a non-Arizona citizen or domiciliary over a non-resident defendant upon a cause of action created by documents executed in the State of New York with which cause of action the State of Arizona has absolutely no connection whatsoever.

The vice of the attempted assertion by the District Court of jurisdiction over the appellant is dramatically illustrated by what has occurred in the instant case. The only consideration which induced this defendant to settle and compromise the various suits and claims in which it was involved prior to October 3, 1963 was the enormous and imminently ruinous cost of being compelled to engage in extensive litigations in California, Arizona and other states many thousands of miles from its principal office (R. pp. 82-83). It sought to purchase its peace, permanently, and remove itself from these various forums in which it was incurring an economic burden which it could no longer bear by executing, in the State of New York, an agreement of settlement and compromise which terminated, for all time, any contact whatsoever with the State of Arizona. It sought, by these means and by the contemplated expenditure of an enormous sum of money, to dispose of matters for which it had denied any liability whatsoever, by defining and limiting its obligation, as well as the obligations of the other party to the controversies between them, to the duties and responsibilities created by the settlement agreement executed and delivered in New York. The alleged breach of that agreement by either Union or Dragor created litigable issues which possess no constitutional nexus whatsoever with any other jurisdiction but the State of New York.

The settlement which both parties are seeking to affirm, each charging the other with its breach, disposed forever of any possible contact with the State of Arizona which may

have existed prior to the execution thereof. Dragor has nevertheless been subjected by the ruling of the District Court below to a litigation in Arizona upon the very contract by which, for an inordinate price, it had sought to disassociate itself from a state where continued litigation threatened it with financial ruin (R. p. 83).

CONCLUSION

The action of the District Court is constitutionally invalid and void. It is respectfully submitted that the judgment appealed from be reversed, the defendant's motion to quash the service of process and dismiss the complaint because the Court lacked jurisdiction of the subject matter of this action and the person of this defendant be granted and all proceedings heretofore had in the District Court of Arizona be annulled.

Respectfully submitted

HULL, TERRY & FORD and
LOTTERMAN & WEISER,
Attorneys for Appellant,
Dragor Shipping Corporation

NORMAN S. HULL
JOSEPH LOTTERMAN
PAUL ZOLA
Of Counsel

Certificate of Compliance

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH LOTTERMAN
Attorney